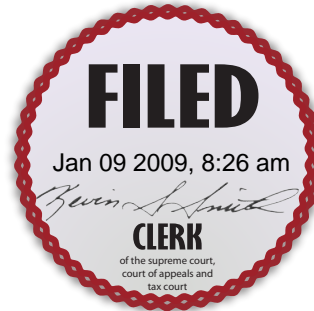


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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ELIVERIO GALLEGOS,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 71A03-0804-CR-208

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APPEAL FROM THE ST. JOSEPH SUPERIOR COURT  
The Honorable R.W. Chamblee, Judge  
Cause No. 71D08-0412-FB-184

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**January 9, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issue

Following a jury trial, Eliverio Gallegos was convicted of rape, a Class B felony, and sentenced to ten years at the Indiana Department of Correction. For our review, he raises the following issue: whether the trial court erred in excluding evidence of the reason Gallegos left Indiana after the crime. Concluding that the trial court did not abuse its discretion in excluding the evidence, we affirm.

### Facts and Procedural History

In September of 2004, E.N. lived with her sister and brother-in-law, Josephine and Marcello, and their children in South Bend, Indiana. On September 23, 2004, E.N., who watched the children during the day while Josephine and Marcello worked, returned to the house from walking the two oldest children to school. As E.N. entered the fenced and gated yard, Gallegos, Marcello's brother, came to the gate and asked to see Marcello. E.N. told Gallegos that Marcello would return home at 4:00 p.m. and continued toward the house. Gallegos came through the gate and grabbed E.N. from behind as she opened the door. Gallegos knocked E.N. to the floor, causing her to hit her head, and forced her to engage in intercourse despite her pleas that he let her go and her attempts to push him off her. Gallegos left soon thereafter. After Josephine and Marcello returned home from work that day, E.N. told them what had happened and called the police. After E.N. spoke to a police officer who came to the house, she went to the hospital for a sexual assault examination. A DNA sample recovered from E.N.'s underwear matched Gallegos's DNA profile.

A few days after the rape, Gallegos went to California, where he stayed for two years. When he returned to Indiana, he was charged with rape, a Class B felony. Gallegos did not dispute that he had intercourse with E.N., though he claimed it was consensual and part of a months-long relationship between the two. He testified that after the encounter in question, E.N. indicated her desire to marry Gallegos. When he refused, E.N. became angry and told him he “was going to be sorry.” Transcript at 342. He testified that he left Indiana “[b]ecause my brother was looking for me . . . because he wanted to hit me.” Id. at 344. A jury found Gallegos guilty as charged, and the trial court sentenced him to ten years at the Indiana Department of Correction.

### Discussion and Decision

Gallegos contends that the trial court erred in excluding evidence regarding his reason for leaving Indiana after the rape.

#### I. Standard of Review

The admission or exclusion of evidence is within the sound discretion of the trial court, and we review the trial court’s decision only for an abuse of that discretion. Marshall v. State, 893 N.E.2d 1170, 1174 (Ind. Ct. App. 2008). A trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before the court. Id. We will reverse only when a manifest abuse of discretion denies the defendant a fair trial. Id.

#### II. Exclusion of Evidence

As a witness for the State, Marcello testified that after E.N. told him about the assault, he went to look for Gallegos at their sister’s house where Gallegos had been

living; however, Gallegos was not there. The State asked if he knew where Gallegos had gone. Gallegos objected on the basis of relevance. The State responded that “[h]e fled the jurisdiction. I think that is absolutely relevant.” Tr. at 278. The trial court overruled the objection, and Marcello testified that Gallegos left South Bend after this happened and “went towards Nevada, somewhere out there.” Id. at 279.

Gallegos testified that he left Indiana because “my brother was looking for me . . . because he wanted to hit me.” Id. at 344. His counsel asked what reason Marcello had to be angry with him, and Gallegos said, “There are rumors.” Id. At that point, defense counsel asked for a sidebar, at which he said, “I think he may say something that is going to be improper. That’s why I stopped him. So I feel if you allow me to rephrase the question I think I can do that.” Id. Gallegos then testified that before he left for California, he was aware Marcello was angry with him, and that his anger was “based on what happened or didn’t happen with [E.N.]” Id. at 345. Before beginning his redirect examination, defense counsel requested another sidebar:

[Defense counsel]: I have a couple questions, but I wanted to give [the State] a chance to address them because I think he would object. A couple things I intended to ask the witness how long his relationship with [E.N.] had been going on. I intended to ask him.

[Court]: Is there an objection?

[State]: No, I don’t think so.

[Defense counsel]: I intended to ask his knowledge did his brother Marcello know this was going on and then follow up with –

\* \* \*

[Defense counsel]: I was going to ask did his brother know. I expect him to say no. I would ask him did you ever tell your brother. And, no, I don’t believe he did. And if I ask him why I believe he would tender that he thought or he believed or he had heard from other family members there was some type of relationship between the victim and the brother. And that

was what I was trying to get into when I stopped him, and that's really what I wanted to give [the State] a chance before we got near it.

[State]: That clearly would be a [Rule] 412 violation. Any allegation that his brother was having sexual relations with the victim. The other portion about did you tell your brother, that's not hearsay, I can't object to that. But on his reasons why, one, is speculation.

[Court]: Okay. Time out for a second. Why would you not tell? What is the purpose? What does that matter. You said I was going to ask him why. What is the significance of that if his brother probably didn't know any way.

[Defense counsel]: Well, it ties in I would think to the whole reason why, you know, he is being worried about why his brother was quote, unquote looking for him.

[Court]: If he didn't – if his brother denies it was going on. And even if he did know it was going on when it happened on the 23<sup>rd</sup> or 21<sup>st</sup>, or the 19<sup>th</sup>, the fact he may or may not have it's consistent with I want to kick your ass. He asked the question. You make your objection. The last question about why you don't get anything until –

[State]: I guess I did for a motion in limine on 412 violation.

[Court]: I just got through telling him if he asked the question so you wouldn't have to ask that question.

[Defense counsel]: No.

[Court]: Otherwise if you decide you really have to ask the question come up and see me.

[Defense counsel]: That's why I did.

[Court]: Although he just did that and I just gave him the answer.

Id. at 361-64. Gallegos then testified that the relationship between himself and E.N. had been going on for four months, and that to his knowledge, Marcello did not know about the relationship. Both sides concluded their questioning without going into the matter further. Jurors then submitted their questions for Gallegos.<sup>1</sup> The parties had the following discussion about one of the questions:

[State]: [That] gets into that issue that [defense counsel] brought up before about he believed that his brother may have had some type of sexual relations with the girl. I think that's way too dangerous.

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<sup>1</sup> The text of the juror questions is not part of the record.

[Court]: What do you think?

[Defense counsel]: If there was some type of relationship between Marcello and [E.N.] that would certainly go to explain his behavior. I understand the state's concern with whether or not that was a prior sexual relationship. But even if it was just a romantic versus sexual does that split hairs too finely. 412 requires notice which I didn't provide because I did not intend.

[Court]: . . . It's not admissible. It doesn't say if it tends to prove a motive on the part of somebody to lie so he makes that objection. It's pretty straight forward.

Id. at 367-68. Gallegos contends that because the State elicited testimony regarding his flight from the jurisdiction in order to show consciousness of guilt, he should have been allowed to present evidence to explain his absence. See Caveney v. State, 210 Ind. 455, 461, 4 N.E.2d 137, 139 (1936) (the defendant is entitled to introduce into evidence any facts to explain his flight consistent with his innocence).<sup>2</sup>

The context in which this issue arose is unusual, in that defense counsel did not pose a question and let the State object, but raised the potentially objectionable nature of the question himself. Nonetheless, the parties' discussion and the trial court's ruling focused on whether Indiana Evidence Rule 412 would allow the expected testimony. Evidence Rule 412 embodies Indiana's Rape Shield Rule:

- (a) In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except:
  - (1) evidence of the victim's or of a witness's past sexual conduct with the defendant;

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<sup>2</sup> The State contends that Gallegos has waived this issue by failing to make a proper offer of proof. See Ind. Evidence Rule 103(a)(2); Woods v. State, 892 N.E.2d 637, 641-42 (Ind. 2008) ("To reverse a trial court's decision to exclude evidence, there must have been error by the court that affected the defendant's substantial rights and the defendant must have made an offer of proof or the evidence must have been clear from the context. . . . The purpose of an offer of proof is to convey the point of the witness's testimony and provide the trial judge the opportunity to reconsider the evidentiary ruling.") (emphasis in original). Although Gallegos never made a formal offer of proof, the substance of the testimony was clear from the context and we decline to find the issue waived on this basis.

- (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;
- (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or
- (4) evidence of conviction for a crime to impeach under Rule 609.

The purpose of the Rape Shield Law is “to encourage the reporting of sexual assaults and to prevent victims from feeling as though they are on trial for their sexual histories.” McVey v. State, 863 N.E.2d 434, 443 (Ind. Ct. App. 2007), trans. denied. Here, Gallegos's explanation for why he left Indiana would have implied a relationship between E.N. and Marcello and presumably would have invited the jury to infer that E.N. lied to Marcello and the authorities about the consensual nature of the encounter with Gallegos. None of the exceptions to the Rape Shield Law apply to such evidence; however, Gallegos is correct that “the validity of precluding particular exculpatory evidence should be determined on a case-by-case basis . . . .” Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000), trans. denied.

We note first a procedural default: Evidence Rule 412 requires the proponent of past sexual conduct evidence to make a written motion at least ten days before trial describing the evidence he or she proposes to offer. Evid. R. 412(b)(1). The motion may be made less than ten days before trial if good cause is shown. Id. Gallegos acknowledged at trial that he did not make a timely written motion. Moreover, Gallegos did not show good cause for allowing such evidence absent the proper notice. He was therefore not entitled to introduce prior sexual conduct evidence. See Graham v. State, 736 N.E.2d 822, 826 (Ind. Ct. App. 2000) (holding that the “procedural error is fatal to

[defendant's] attempt to introduce evidence of prior false rape allegations. To hold otherwise would allow circumvention of the rule itself.”), trans. denied.

Gallegos's attempt to introduce the past sexual conduct evidence fails substantively as well. The jury heard testimony from Gallegos that he and E.N. had an on-going relationship, the intercourse was consensual, she threatened him after he said he did not want to marry her, and he left Indiana because his brother was angry with him. Because Gallegos does not dispute that he had sexual intercourse with E.N., the cases in which we have held that it was error to exclude prior sexual conduct evidence that was potentially exculpatory in nature are not applicable. See Steward v. State, 636 N.E.2d 143, 150 (Ind. Ct. App. 1994) (trial court erred in not allowing evidence that molestation victim reported four other men had molested her around the same time she reported molestation by the defendant), aff'd, 652 N.E.2d 490 (Ind. 1995); Saylor v. State, 559 N.E.2d 332, 335 (Ind. Ct. App. 1990) (trial court erred in not allowing evidence of earlier molestation of victim, evidence critical to defense that mentally handicapped victim, unable to fully comprehend time, had substituted defendant as perpetrator of acts which occurred earlier in her life), trans. denied. Gallegos's proffered evidence would have attacked E.N.'s credibility – credibility that he had already attacked with his testimony about the nature of their relationship and of the sexual encounter. Moreover, as to the specifics of the proffered sexual conduct evidence, Gallegos testified that “there are rumors.” Tr. at 344. In short, Gallegos's evidence may not have been admissible even if it was otherwise allowed under the Rape Shield Law. See, e.g., Evid. R. 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a



finding that the witness has personal knowledge of the matter.”); Evid. R. 802 (“Hearsay is not admissible except as provided by law or by these rules.”). Under these circumstances, the trial court did not abuse its discretion in prohibiting Gallegos from offering evidence of a relationship between E.N. and Marcello.

### Conclusion

The trial court did not abuse its discretion in excluding Gallegos’s proffered evidence regarding his reason for leaving Indiana where he did not meet the procedural requirements for admission of such evidence, did not meet one of the exceptions for admission of sexual conduct evidence under the Rape Shield Law, and did not otherwise show that he was denied a fair trial in the absence of such evidence. The judgment of the trial court is affirmed.

Affirmed.

CRONE, J., and BROWN, J., concur.